

A CRITIQUE OF THE MOTIVATIONS BEHIND NEGATIVE ACTION AGAINST ASIAN AMERICANS IN U.S. UNIVERSITIES: THE MODEL VICTIMS

SHAWN HO*

To deal effectively with negative action against Asian Americans, it is crucial to first understand the motivations behind negative action. This Article posits that these motivations are complex—they are an intricate tapestry of racism and benevolence interwoven with both conscious and unintentional aspects. In theorizing about and critiquing these motivations by unpacking a 4-quadrant matrix, it seeks a deeper understanding of how to deal with negative action against the “Model Victims.” This Article further suggests that the tensions arising from negative action flow from the Supreme Court’s adoption of a pure diversity rationale for affirmative action; it is necessary to have a more nuanced conception of college diversity that remains true to the spirit of remediation for America’s legacy of racial injustice while simultaneously seeking to dismantle stereotypes and racism. Finally, it discusses the possible ways for Asian Americans to deal with negative action going forward. Only by seriously grappling with its own history and the cultural scripts that disadvantage Asian Americans—and all groups of color—can America hope to effectuate its ideals of true meritocracy.

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I. INTRODUCTION

The Asian American student was, by all traditional metrics, a consummate success: perfect scores on three college admissions tests, top of the class at a competitive high school, captain of the tennis team, and a volunteer for National Public Radio.¹ Despite these accomplishments, Harvard University rejected the student's application to join the 2014 entering class.² The Students for Fair Admissions (SFA) filed a federal suit in Massachusetts in November 2014. The SFA, a Texas-based non-profit organization, alleged that Harvard employs impermissibly "racially and ethnically discriminatory policies" when evaluating undergraduate students, which penalize Asian American applicants solely on the basis of race.³

Was the student denied admission to a highly selective U.S. university because he is Asian American,⁴ that is, because of "negative action"? What are the motivations behind negative action against Asian Americans? Many writers have written about how the Asian American model minority stereotype has been used to argue against affirmative action.⁵ However, a conspicuous omission in the literature is the impact of the stereotype's corollaries on negative action. Negative action is immensely important as it affects the next generation of Asian American leaders, with adverse ripple effects on the numbers of Asian Americans in graduate schools, academia, and the professional fields. Ultimately, negative action stymies Asian Americans' aspirations to join America's inner circle of political, economic, and social leaders, limits that leadership circle's exposure to bright minds with fresh ideas, and breeds cynicism among Asian students and parents who emigrated here in search of opportunity.⁶ To deal effectively with negative action against Asian Americans, it is crucial to first understand the motivations behind negative action.

* Legal Service Officer, Singapore; LL.M., Columbia University School of Law; LL.M., Cambridge University; LL.B. with Honors, National University of Singapore. All views expressed in this article remain the author's own views, and do not represent the views of his organization.

¹ *Harvard Under Fire*, THE ECONOMIST, Nov. 29, 2014, <http://www.economist.com/news/united-states/21635027-does-university-impose-silent-quotas-against-asian-americans-harvard-under-fire>.

² Complaint at 8, *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 14 Civ. 14176 (D. Mass. Nov. 17, 2014).

³ *Id.*

⁴ By "Asian American", I refer to persons of Asian descent who live in the U.S., regardless of citizenship status. The term "Asian American" can serve as a unifying identity based on the common experiences of Asian Americans because of the inability of most non-Asian Americans to distinguish between different Asian groups. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1243, 1246 n.7 (1993).

⁵ Among the most prominent is Mari J. Matsuda, *We Will Not Be Used: Are Asian-Americans the Racial Bourgeoisie?*, in *Where is Your Body?*, 149-59, 150 (1997). Frank H. Wu has criticized the use of the model minority stereotype (for political purposes) as a means of attacking affirmative action for other racial minority groups. See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 227 (1995).

⁶ Daniel Golden, *The New Jews: Asian Americans Need Not Apply*, in *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES — AND WHO GETS LEFT OUTSIDE THE GATES* 196, 200-01 (2007).

What are the motivations behind negative action? This Article argues that the motivations behind negative action against Asian Americans are not simply outright prejudice against those of Asian origin; rather, they are an intricate tapestry of racism⁷ and benevolence, with both conscious and unintentional aspects. This Article further suggests that the tensions arising from negative action flow from the Supreme Court's adoption of a pure diversity rationale for affirmative action, calling for an increased attention to the remediation rationale.

Negative action is undoubtedly motivated partly by the conscious idea that defensive measures are required to curb unfair competition by Asian American students. Racism in negative action may often stem from unintentional and often unconscious acceptance of the corollaries of the model minority stereotype:⁸ that Asian Americans are only good at S.T.E.M. (science, technology, engineering, and mathematics) fields, are not well-rounded, and ultimately below Whites in the American racial hierarchy.

But such racism alone does not present a complete picture. This Article also examines the purportedly benevolent aspects of negative action, in which admissions officers either consciously or subconsciously believe that negative action will eventually benefit Asian Americans by promoting racial diversity and reducing racial tension and resentment against Asian Americans. This essay aims to critique the motivations behind negative action against Asian Americans, and in so doing, get a deeper understanding of how to deal with its consequences.

In Part II, this Article will define negative action against Asian Americans. In Part III, it will move on to examine the myriad ways that negative action is perpetuated against Asian Americans. In Part IV, this Article will theorize about and critique the motivations behind negative action against Asian Americans and endeavor to unpack a four-quadrant matrix involving racism and benevolence that is both conscious and unintentional. Finally, Part V will conclude by discussing the possible ways for Asian Americans to deal with negative action going forward.

II. DEFINING NEGATIVE ACTION AGAINST ASIAN AMERICANS

Jerry Kang, Law Professor and Associate Provost at the University of California Los Angeles (UCLA) School of Law and the Korea Times-Hankook Ilbo Endowed Chair in Korean American Studies, defines negative action as:

“Unfavorable treatment based on race, using the treatment of Whites as a basis for comparison. In functional terms, negative action against Asian Americans is in force if a university *denies admission to an Asian American who would have been admitted had that person been White.*”⁹

Negative action has been described as a “minus factor” applied to Asian American candidates relative to white candidates, a practice that is separate and apart from any affirmative action “plus factor” given to other minority

⁷ Frank H. Wu, *The Symbolic Black and White: The New Challenges of a Diverse Democracy* (2010) (unpublished manuscript) (on file with author) (“So what I’d like to suggest is that we must understand that much of the struggle that we face . . . has to do with the legacy, the shared burden of history that we together bear, it has to do with institutions and structures. *It has to do with those cases that we might well balk at calling ‘racism,’ yet where it is apparent that a pattern emerges that correlates to race: we lack the appropriate vocabulary to describe this protean phenomenon. And so the label is less important than the effects. Many would resist the term ‘racism,’ even if they could be persuaded of the influence of race. They can be won over with effective advocacy.*”) (emphasis added).

⁸ Jerry Kang described the operation of racial stereotypes in our interactions with others as “racial mechanics . . . we map each other into racial categories that trigger associated racial meanings.” Darren Seiji Teshima, *A ‘Hardy Handshake Sort Of Guy’: The Model Minority And Implicit Bias About Asian Americans In Chin v. Runnels*, 11 ASIAN PAC. AM. L.J. 122, 131.

⁹ Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (emphasis added).

applicants.¹⁰ Adrian Liu has argued that while affirmative action reduces race discrimination in admissions by enlarging the notion of merit in a way that benefits all groups, negative action disadvantages Asian Americans on the basis of race and maintains the discriminatory effects of traditional admissions policies.¹¹

Negative action has also been likened to the treatment of Jewish people. In the early 20th century, Jewish applicants to universities and jobs faced similar responses to those which face many Asian Americans today; mainstream American society viewed Jewish people as a competitive threat and inherently disloyal to America, leading many universities to establish higher admissions standards for Jewish applicants than for their non-Jewish white counterparts. In fact, in the early 20th century, some Ivy League institutions placed strict caps on the number of Jewish students they would accept.¹² In today's negative action landscape, such caps are no longer used. Jerry Kang notes, however, that negative action can be implemented either by a "hard" system of inflexible quotas or by a "soft" unquantified, gestalt admissions calculation.¹³ The substantial discretion afforded to college admissions officers, coupled with the relative secrecy of the admissions process, allows for such "soft" calculations to play important but unknown roles in Asian American students' chances of success. The next part of this Article will document some of the more common ways in which Asian Americans are and have been disadvantaged, whether consciously or not, in the college admissions process.

It is worth noting that the forms of negative action this Article deals with are undoubtedly not exclusively used to disadvantage Asian American applicants. Negative action also applies to disadvantage other racial minorities, such as African Americans and Latinos. This paper focuses on the impact of negative action on Asian Americans, due to several unique aspects of the Asian experience in America. Though the population of people of Asian origin is growing faster than any other racial group in America, Asian Americans represent roughly five percent of the U.S. population.¹⁴ Consequently, it is more difficult for Asian Americans to organize politically to address these issues, and Asian organizing efforts and campaigns to build political leverage and power are particularly difficult. Organizing efforts are further hampered by the linguistic, cultural, and phenotypic diversity encompassed by the term "Asian American." These differences mean that the experiences of Asian American differ vastly; the South Asian American experience in the wake of the terrorist attacks of September 11th, 2001, for example, has differed greatly from the experiences of other Asian Americans.

III. MYRIAD WAYS THAT NEGATIVE ACTION IS PERPETUATED AGAINST ASIAN AMERICANS

There are several indicators that negative action is being employed—both explicitly and implicitly—against Asian Americans in university admissions. As a purely empirical matter, Asian American students often

¹⁰ William C. Kidder, *Negative Action versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 606 (2006). This Article thus does not seek to criticize the use of affirmative action to broaden conceptions of merit and remedy institutional racism as a result of overt discriminatory policies of the past; rather, it will seek to lay out the problems of the current framework under which many universities operate, resulting in widespread problems of negative action.

¹¹ Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391, 397 (2008).

¹² See Kidder, *supra* note 11 (Noting the harmful effects of unsupported claims regarding Asian Americans influencing public discourse). See also Scott Jaschik, *New Arguments on Affirmative Action*, INSIDE HIGHER ED (June 21, 2006), <http://www.insidehighered.com/news/2006/06/21/affirm>. Ultimately, it is the "iron law" of university admissions at work: "An institution will retain a particular process of selection only so long as it produces outcomes that correspond to perceived organizational interests (of the dominant White majority)." Ling-Chi Wang, *Meritocracy and Diversity in Higher Education: Discrimination Against Asian Americans in the Post-Bakke Era*, 20 THE URB. REV. 189, 191 (1988).

¹³ Kidder, *supra* note 8. Other commentators have noted that negative action exists in many forms - it can involve outright discrimination against Asian Americans, admission limits on Asian Americans in the name of maintaining diversity, or existing bias in admissions policies that disadvantage Asian Americans relative to Whites. See Liu, *supra* note 12, at 414.

¹⁴ Anna Brown, *U.S. Hispanic and Asian Populations Growing, but for Different Reasons*, PEW RESEARCH CTR. (June 26, 2014), <http://www.pewresearch.org/fact-tank/2014/06/26/u-s-hispanic-and-asian-populations-growing-but-for-different-reasons/>.

need to perform better on standardized exams to receive the same benefit as their white counterparts. A 2009 study by Espenshade and Radford established that, controlling for other factors of students' backgrounds, a student who self-identifies as Asian would need to score on average 140 points higher on the Standardized Admissions Test ("SAT") than a white student, 320 points higher than a Latino student, and 450 points higher than a black or African American student to gain admission to the same undergraduate institution.¹⁵ Thus, whether in the form of "hard" or "soft" negative action, the data strongly suggests that at least some Asian Americans are being denied admissions into universities to which their similarly qualified white colleagues are admitted.

Some upper level administrators at prestigious U.S. universities have explicitly admitted to taking negative action against Asian Americans.¹⁶ The Chancellor of the University of California, Berkeley ("UC Berkeley"), for example, stated that "It is clear that decisions made in the admissions process indisputably had a disproportionate impact on Asians." California Congressman Rohrabacher took a more conservative tone in remarking, "That's academic gobbledygook for: 'We discriminated.'"¹⁷ After such contentious debates about the role of race in admissions decisions, California banned all state governmental institutions from considering race and ethnicity in areas of public employment, public contracting, and public education in 1996, forcing all state schools to adopt completely race-blind admissions policies.¹⁸ As a result, over the past 20 years, the percentage of students of Asian descent accepted into UC Berkeley has increased sharply from 25% in 1989 to about 45% in 2012.¹⁹ Certain private schools in California began to follow this pattern as well, with similar results; California Institute of Technology, a private university that has adopted a similar race-blind admissions policy, displayed a similar trend: the percentage of its students of Asian descent increased from 25% in 1992 to about 43% in 2013.²⁰ Importantly, such race-blind measures are not without problems. Proposition 209 has been repeatedly challenged by pro-affirmative-action groups; data suggests that the adoption of race-blind admissions policies has had the effect of dramatically reducing the number of black and Latino students admitted to University of California schools. At UC Berkeley, for example, the admissions rate for black students fell from 49% in 1997 to just 24% in 1998—the first year of students admitted after the new policies went into effect.²¹

Despite these changes in California schools, most highly selective universities have continued to use race in their admissions decisions, enacting and maintaining an array of policies that negatively affect Asian Americans.²² Indeed, Asian American student populations are relatively low at most highly selective universities: 15.5% of Yale's 2013 entering class is Asian American, compared with 16.1% of Dartmouth's, 17.6% of Princeton's, and 19.1% of Harvard's.²³ Such numbers are artificially controlled, both in the past and now, through a variety of policies where negative action is brought to bear against Asian Americans.

¹⁵ THOMAS J. ESPENSHADE AND ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009).

¹⁶ See Kang, *supra* note 10, at 19 (noting examples of universities admitting to some forms of negative action).

¹⁷ Harold Johnson, *Model Victims*, NAT'L REV., July 20, 1992, at W7, *available online at* http://findarticles.com/p/articles/mi_m1282/is_n14_v44/ai_12504486/.

¹⁸ CAL. CONST. art. I, § 31

¹⁹ Rohin Dhar, *Do Elite Colleges Discriminate Against Asians?*, PRICEONOMICS (Apr. 24, 2013), <http://blog.priceonomics.com/post/48794283011/do-elite-colleges-discriminate-against-asians>

²⁰ Stephen Hsu, *20 years @15 percent, does Harvard discriminate against Asian-Americans?*, *Spartan Ideas*, MICH. STATE U. (Nov. 18, 2014), <http://spartanideas.msu.edu/2014/11/18/20-years-15-percent-does-harvard-discriminate-against-asian-americans/>

²¹ Michael Dobbs, *Universities Record Drop in Black Admissions*, WASHINGTON POST, Nov. 22, 2004, at A01, *available online at* <http://www.washingtonpost.com/wp-dyn/articles/A2830-2004Nov21.html>.

²² Pat K. Chew, *Asian Americans: The 'Relicent' Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 63 (1994).

²³ Kara Miller, *Do colleges redline Asian-Americans?*, THE BOSTON GLOBE (February 8, 2010), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/02/08/do_colleges_redline_asian_americans/.

Until quite recently in the history of Asians in America, many universities used strict quota systems to cap the number of Asian American admissions. For example, Asian American students used to be denied admission to Brown University regardless of their credentials once their number reached a historically determined upper quota.²⁴ A Brown study revealed that each fall, the admissions office established a set of enrollment goals based on the structure of the previous year's freshman class.²⁵ The number of admitted students was monitored throughout Brown's admissions season to ensure that the relative proportions of athletes, minorities, and alumni children, remained fairly constant from year to year.²⁶ As would be expected, this admissions process perpetuated the university's existing racial composition and failed to account for demographic changes within American society at large. As Asian immigration began to increase following the passage of the Immigration and Nationality Act of 1965—which ended the ban on immigration from all Asian countries which had been in place for decades—Asians came to represent the fastest growing group of applicants for university admission. Brown's continued use of historically determined upper quotas, however, did not adjust the number of students of Asian origin admitted accordingly, keeping the number of Asian students disproportionately low.²⁷ Brown later conceded that such a quota was unfair towards Asian American applicants.²⁸ And in the late 1970s, the Supreme Court ruled that strict racial quotas are not permitted.²⁹

Current forms of negative action are often more subtle and less overtly racialized. A common form of such subtle negative action is the practice of comparing Asian American students only to each other during the admissions process. Such a mechanism keeps some level of racial quota in place by implying that universities should only accept the most qualified candidates from each racial group.³⁰ Universities further disadvantage students of Asian origin and artificially deflate their numbers by instituting a minimum verbal SAT score.³¹ Though the SAT has been refined and changed over the years—for example, by splitting the verbal component into critical reading and writing sections—the verbal competencies tested by the SAT continue to be a mainstay of the exam. Asian Americans previously argued that UC Berkeley instituted a minimum 400 SAT verbal score to limit Asian American admission rates.³² The Chancellor repeatedly denied the existence of a minimum verbal score.³³ In the history of UC Berkeley, the Chancellor went on, such a criterion had never before been used to reject qualified applicants in the competitive admissions pool.³⁴ In all published announcements, catalogs, and application forms, the policy had always been to use only the combined SAT verbal and math scores, the combined scores of three achievement tests, and GPA, for competitive admissions decisions.³⁵ In the end, under pressure from the Asian community, UC Berkeley's Assistant Vice Chancellor admitted that, "At one point (in 1984) a minimum 400 Verbal SAT score was set, but shortly after the written directive was issued, it was withdrawn."³⁶ While on its face, such a policy might seem to serve a school's interest in ensuring English language competency of its student body, the disparate impact such a policy had on Asian

²⁴ U.S. COMM'N. ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 13, 112. *See also* Chew, *supra* note 17, at 63.

²⁵ Grace W. Tsuang, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L. J. 659, 669 (1989). Things do not appear to have changed in the 21st century; for example, the summary of the best practices from a diversity manual reminds admissions officers to be "aware of demographic statistics from previous years." Summary of Best Practices from *Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions*, Bingham McCutchen LLP, Morrison & Foerster LLP, and Heller Ehrman White & McAuliffe LLP 1, 37 (2004).

²⁶ *Id.* at 669.

²⁷ *Id.* at 669.

²⁸ U.S. COMM'N. ON CIVIL RIGHTS, *supra* note 25, at 112.

²⁹ Board of Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

³⁰ Liu, *supra* note 12 at 421-22.

³¹ Gabriel J Chin et. al., *Beyond Self Interest: Asian Pacific Americans Toward a Community of Justice: A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 139 (1996).

³² Tsuang, *supra* note 26, at 674.

³³ *Id.*

³⁴ Wang, *supra* note 13, at 197.

³⁵ *Id.*

³⁶ *Id.*

students was troubling. Nationally, students scored an average of 426 points on the verbal section of the SAT. The university *knew* that Asians, on average, scored 28 points below the national average on the verbal section of the SAT, placing the average Asian verbal score at 398—just two points below the “neutral” cutoff selected by UC Berkeley.³⁷ Such circumstances, combined with the history of Asian exclusion and the relative secrecy of the policy, give rise to a strong inference that the intent behind the secret decision was to disqualify some UC Berkeley-eligible Asian American applicants from competition with white applicants.³⁸ Similar forms of language discrimination that disproportionately impact Asian applicants include the practice of giving additional points to those applicants who were exempt from remedial English, and to those who had four years of a foreign (European) language.³⁹ Although these criteria appear to be neutral, they have a disparate impact against applicants of immigrant and refugee backgrounds, many of whom are Asian American.⁴⁰ Some universities have taken the opposite approach to Asian exclusion by increasing minimum GPA requirements for an automatic admission but not altering the minimum test score for automatic admission. Since Asian Americans were historically more likely to be admitted automatically on the basis of GPA, this change effectively reduced their numbers.⁴¹

Another area in which admissions officers for public universities can bring to bear negative action against Asian American applicants is in the practice of redirection. The University of California system, for example, maintains UC Berkeley as its flagship university by redirecting certain applicants to other, less prestigious, schools within the state system.⁴² Given the substantial discretion afforded to admissions officers in this redirection, Asian Americans are redirected at much higher rates than any other group.⁴³ Indeed, UC Berkeley has a policy of redirecting applicants of poor and disadvantaged backgrounds “who are not Blacks, Hispanic or Native Americans” to other universities.⁴⁴ Previously, UC Berkeley-eligible and non-competitive applicants who were poor and disadvantaged (regardless of race) were not redirected to other campuses. Subsequent investigations revealed that this decision—which represented a major policy shift from a socioeconomic to a race-based admission program—was made without the participation and approval of the Academic Senate Committee on Admissions and Enrollment.⁴⁵ Since there has always been a larger proportion of Asian American applicants who are from disadvantaged backgrounds in the San Francisco Bay area than Whites, the decision to redirect poor students while exempting other racial groups disproportionately affected Asian American applicants.⁴⁶

Finally, and most significantly, legacy preferences⁴⁷ are another form of negative action. Legacies give special consideration to applicants with family members who are alumni or who have contributed financially to the school.⁴⁸ At Harvard, 16% of the 2,023 admitted students in 2014 had at least one alumni parent.⁴⁹ While universities may claim that legacy preferences strengthen alumni bonds and tradition, these preferences were

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 199.

⁴⁰ *Id.* See also Chin et. al., *supra* note 32, at 139.

⁴¹ See Chew, *supra* note 17 at 63.

⁴² Wang, *supra* note 13.

⁴³ *Id.*

⁴⁴ See *supra* note 10, at 196.

⁴⁵ *Id.* To compound matters, the change was never announced publicly. *Id.*

⁴⁶ *Id.*

⁴⁷ C.N. Le, *A Closer Look at Asian Americans and Education*, *New Horizons for Learning*, JOHNS HOPKINS SCHOOL OF ED. (Dec. 2001), available online at <http://education.jhu.edu/PD/newhorizons/strategies/topics/multicultural-education/A%20closer%20look%20at%20asian%20americans%20and%20education/>.

⁴⁸ Liu, *supra* note 12, at 403.

⁴⁹ *An Hereditary Meritocracy* [sic], THE ECONOMIST (Jan. 24, 2015), <http://www.economist.com/news/briefing/21640316-children-rich-and-powerful-are-increasingly-well-suited-earning-wealth-and-power>.

originally introduced to give advantages to Whites over Jewish American applicants.⁵⁰ As white applicants are more likely to have family members who are alumni or who have contributed financially to the school, legacies also tend to benefit white students over Asian Americans.⁵¹ From 1979 to 1988, Asian Americans accounted for 15.7% of all Harvard applicants but only 3.5% of alumni children.⁵²

The aforementioned examples delineate the wide variety of policies that currently exist to negatively affect Asian Americans in U.S. universities. The reasons for these policies are complex and often inconsistent, but are nevertheless important to understand in crafting effective solutions to the negative action problem. In its next part, this Article will turn to examining and critiquing the motivations behind negative action against Asian Americans.

⁵⁰ Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1041 n.237 (1997). Harvard and Princeton accept 40% and 35% of legacies respectively but only 11% of all applicants. At Notre Dame, nearly a quarter of students are children of graduates. See Le, *supra* note 49.

⁵¹ Liu, *supra* note 12, at 403.

⁵² Golden, *supra* note 6, at 202.

IV. THEORIZING AND CRITIQUING THE MOTIVATIONS BEHIND NEGATIVE ACTION AGAINST ASIAN AMERICANS

While it is easy to consider active racism the sole motivating force behind negative action, such a belief is too simplistic. The motivations behind negative action against Asian Americans are complex and include both the conscious and unintentional aspects of racism and benevolence. In the table below, marked Table 1, the intersections of each of these aspects are termed in ways that will be explained throughout this section.

Table 1:

Motivation Behind Negative Action	Conscious	Unintentional
Racism	Unfair Competitor (<i>Quadrant 1</i>)	Corollaries of the Model Minority Stereotype (<i>Quadrant 2</i>)
Benevolence	Promote Racial Diversity (<i>Quadrant 3</i>)	Reduce Racial Tension and Resentment (<i>Quadrant 4</i>)

Negative action is motivated in part, of course, by the conscious racist thought that defensive measures are required to prevent unfair competition by Asian American students (Quadrant 1). Racism in negative action also stems, however, from unintentionally⁵³ believing the corollaries of the model minority stereotype (Quadrant 2).⁵⁴ Such corollaries include socialized beliefs about Asian American student achievement, such as the idea that Asian Americans are only good at S.T.E.M. (Science, Technology, Engineering and Mathematics) fields, that Asian Americans are not well-rounded students, or that Asian Americans are below Whites in the racial hierarchy in the United States.

This Article also examines what I have termed the “benevolence” aspects of negative action, in which admissions officers either consciously think or unintentionally believe that negative action would eventually be beneficial for Asian Americans, for example, by promoting racial diversity (Quadrant 3), or reducing racial tension and resentment towards Asian Americans (Quadrant 4). As Jerry Kang noted,

one could assume that the responsible admissions officers . . . were racists who relished disadvantaging Asian Americans . . . another possible explanation is that these admissions officers *sincerely, if mistakenly*, believed that

⁵³ Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory To Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B. C. L. REV., 771, 799.

⁵⁴ GARY OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 141 (1994) (“[T]he yellow peril and the model minority are not poles, denoting opposite representations along a single line, but in fact form a circular relationship that moves in either direction.”).

curtailing the admission of Asian Americans would serve various pedagogical and social goals.⁵⁵

Admissions officers have acknowledged that various forms of conscious and unintentional biases influence their admissions decisions.⁵⁶ Reports by various universities including Brown⁵⁷ and Stanford⁵⁸ underscore the extent to which such conscious and unintentional factors negatively impact Asian American admission rates.

A. Conscious Racism: Thinking That Asian Americans Are Unfair Competitors

Some admissions officers think that negative action towards Asian Americans is necessary in order to limit “unfair competition”. The idea of Asian Americans as treacherous unfair competitors⁵⁹ possessing mindless horde-like qualities⁶⁰ has long been one of the predominant forms of anti-Asian bias in the United States.⁶¹ White America has historically treated Asians sceptically, viewing them as unfair competitors for jobs because of their docility—which made them willing to work in worse conditions and for lower wages than Whites—and collectivism; as early as the 1800s, for example, Japanese farmers⁶² and Chinese laborers⁶³ were resented for competing for scarce employment opportunities by taking positions at lower wages.⁶⁴ Whites believed that contending with Asian American workers was unfair due to the fact that “[Asian Americans] can live where others stronger than [them] would starve. Give [them] *fair play* and this quality enables [them] to drive out stronger races (1869 newspaper editorial).”⁶⁵ These sentiments were also echoed in *Chae Chan Ping v U.S.* where the Supreme Court stated that it was pointless for Whites to compete against Asian Americans.⁶⁶ In the same vein, the President of the Seattle Anti-Japanese League in 1920 asserted that Asian Americans “will work harder, deprive themselves of every comfort and luxury, make beasts of burden of their women, and stick together, *making a combination that America cannot defeat.*”⁶⁷

Such anti-Asian prejudice is sometimes erroneously rationalized by the assumption that Asian Americans are doing too well.⁶⁸ Envy of Asian American success and prosperity prompted some white Americans to react defensively and erect protectionist barriers around scarce resources.⁶⁹ Historical examples of such defensive measures include California’s 1852 mining tax levied against non-citizen miners (the vast majority of whom were Asian American miners),⁷⁰ San Francisco’s manipulation of its licensing authority to

⁵⁵ Kang, *supra* note 10, at 19 (emphasis added).

⁵⁶ Tsuang, *supra* note 26 at 669.

⁵⁷ *Id.* at 665. BROWN U., REPORT TO THE CORPORATE COMMITTEE ON MINORITY AFFAIRS FROM ITS SUB-COMMITTEE. ON ASIAN AMERICAN ADMISSIONS (1984).

⁵⁸ STAN. UNIV., CUAFA SUB-COMMITTEE REPORT ON ASIAN-AMERICAN ADMISSIONS 14 (1986). *See also* Tsuang, *supra* note 26, at 665.

⁵⁹ Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions Of "Foreignness" In The Construction Of Asian American Legal Identity*, 4 ASIAN L.J. 71, 72 (1997).

⁶⁰ Keith Aoki, *Foreign-Ness & Asian American Identities: Yellowface, World War II Propaganda, And Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 4, 33(1996).

⁶¹ Wang, *supra* note 13, at 189.

⁶² ERIC K. YAMAMOTO ET. AL., RACE RIGHTS & REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT 37 (2001).

⁶³ Teshima, *supra* note 6, at 127.

⁶⁴ Harvey Gee, *A Review of Frank Wu's Renegotiating America's Multi-Colored Lines*, N.Y.C. L. REV. 203, 226 (2002).

⁶⁵ ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 40 (1988).

⁶⁶ *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (“[Asian Americans] were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our labourers and artisans. *The competition between them and our people was for this reason altogether in their favor . . .*”) (emphasis added).

⁶⁷ Kang, *supra* note 7, at 42 (emphasis added).

⁶⁸ Chin et. al., *supra* note 26, at 151.

⁶⁹ Chew, *supra* note 17, at 60.

⁷⁰ Yamamoto et al., *supra* note 56, at 37.

close Chinese laundries while allowing white-owned laundries to remain open in the 1880s,⁷¹ the Chinese Exclusion Act of 1882,⁷² the Gentlemen's Agreement of 1907 which excluded Japanese immigrants,⁷³ and California's passage of a law barring noncitizens of Japanese origin—which, as Japanese people could not naturalize at this point in history, effectively applied to all persons of Japanese origin—from fishing in state waters in the 1950s.⁷⁴

Such concerns about unfair competition continue to plague Asian Americans in the college admissions process. With regard to the scarcity of spots in highly selective U.S. universities, admissions officers may feel compelled to react defensively via negative action against the unfairly competitive Asian American students (who are allegedly super-human and capable of studying inhuman hours without any need for leisure)⁷⁵ since the “grade-grubbing Asian-Americans crowd out everyone else”.⁷⁶ After all, at stake are places in traditional institutions from which the U.S. recruits its future leaders and elites.⁷⁷ William Kidder argues that universities fear a return to the yellow peril or Asian people taking over.⁷⁸ These fears stoked by notions of “Japan Inc.”, “Pacific Century”, “and the rise of the East and decline of the West”.⁷⁹ As UC Berkeley's alumni magazine stated so vividly:

I can't help but notice: So many Asians! Black head of hair after jet-black head of hair . . . uncomfortable notion stew in me, and the words push [through my] Berkeley-bred politically correct mindscreens: *The Asians are taking over*.⁸⁰

These examples, though anecdotal, tell us that Asian American stereotypes are an important facet of the Asian American experience in applying to and potentially matriculating at schools like UC Berkeley. It seems reasonable to believe that such fears of an “Asian takeover” is in fact directly and indirectly contributing to negative action against Asian American students.

Such problematic racial ideas are inaccurate and ultimately harmful to both schools and students. The allegation that Asian Americans are overly competitive is, quite simply, not accurate. Some Asian Americans

⁷¹ This practice was struck down in the case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), after the Supreme Court found that all but one Chinese-owned laundries had been denied permits while nearly all white-owned laundries had been granted them. *Id.* at 374.

⁷² See generally Michael Patrick Cullinane, *The “Gentlemen’s” Agreement—Exclusion by Class*, 32 IMMIGRANTS & MINORITIES 139 (2014).

⁷³ Saito, *supra* note 53, at 75.

⁷⁴ Yamamoto et al., *supra* note 56, at 37. For a full list of the myriad ways in which state and municipal governments sought to disadvantage Asian Americans, see Tsuang, *supra* note 26, at 666 n.51 (citing various examples of state-sponsored discriminations faced by Asian Americans).

⁷⁵ See Daniels, *supra* note 59, at 322 (quoting sentiments that Asian Americans are “the most hard-working, disciplined people imaginable” such that observers “don’t know when they sleep.”). See Aoki, *supra* note 54, at 33 (noting alleged sub-human characteristics of Asian Americans, like “capable of working inhuman hours” and “threatening to the hard-working.”).

⁷⁶ Jay Mathews, *Asian American Students and School Stereotypes*, WASHINGTON POST, Jan. 8, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/08/AR2008010802038.html>. These sentiments are reminiscent of the early twentieth century where Ivy League schools limited the number of Jewish students despite their outstanding academic records to maintain the primacy of upper-class White protestants.

⁷⁷ Wang, *supra* note 13, at 201-202.

⁷⁸ See Kidder, *supra* note 8, at 606 (arguing that Asian Americans would benefit the most from eliminating affirmative action). See also Scott Jaschik, *New Arguments on Affirmative Action*, INSIDE HIGHER ED, June 21, 2006, <http://www.insidehighered.com/news/2006/06/21/affirm> (discussing an article arguing that “the primary beneficiaries of the end of affirmative action in college admissions would be Asian American applicants.”).

⁷⁹ Wu, *supra* note 4, at 229.

⁸⁰ Michelle Ling, *Facing the Asian Invasion*, CAL. MONTHLY, Dec. 1998, available online at http://modelminority.com/joomla/index.php?option=com_content&view=article&id=159:facing-the-asian-invasion-&catid=41:identity&Itemid=56 (emphasis added).

may indeed be hardworking due to reasons ranging from a need to make an honest living and support their families to being determined to try their best after entering the United States as refugees and immigrants. However, homogenizing Asian American identity under this banner is grossly—and statistically—inaccurate. For example, one Northeastern University study compared Asian American students and white students matched by gender, comparable scores on college entrance exams, and socioeconomic backgrounds as indicated by their parents' educational backgrounds. Contrary to the fearsome competitor stereotype, the Asian American students had lower grade point averages, were more likely to be on academic probation, were more likely to withdraw for medical reasons, and were less likely to graduate than their white counterparts.⁸¹ Beyond this, constructing a monolithic idea of “competitive Asian” ignores the multiplicity of experiences within the Asian American community. Some Asian American communities, for example, have a higher rate of poverty than the national average; 37.8% and 29.3% of Hmong-Americans and Cambodian-Americans respectively live below the poverty line in the U.S., as compared to the national average of 12.4%.⁸² These students are often the least able to access higher education, and are often the ones in need of the most help to adjust to college life.⁸³ Yet a belief in the inherent competitiveness and diligence of all Asians often leads these students to elect not to pursue higher education or, upon admission, drop out at high rates.⁸⁴

B. Unintentional Racism: Believing The Corollaries Of The Model Minority Stereotype

The model minority stereotype has been extensively studied; on a very basic level, it refers to the idea that Asian Americans, through their hard work, intelligence, and emphasis on education and achievement, have been successful in American society.⁸⁵ Proponents of this stereotype point to certain statistics about Asian American success, such as the fact that about 42% of all Asian American adults have college degrees.⁸⁶ Like many racial stereotypes, while the model minority stereotype contains some truth, “it is exaggerated, distorted, and often presented without causes and contexts.”⁸⁷ Racial stereotypes of Asian Americans have deep structural roots and continue to pervade society because of the expanding reach and scope of contemporary media, only exacerbated by the trend towards the concentration of media control in the hands of increasingly fewer proprietors.⁸⁸

⁸¹ Elizabeth S.W. Ahn Toupin & Linda Son, *Preliminary Findings on Asian Americans: “The Model Minority” in a Small Private East Coast College*, 22 J. CROSS-CULTURAL PSYCHOL. 403, 406-412.

⁸² NAT'L. COMM'N. ON ASIAN AM. AND PAC. ISLANDER RESEARCH IN EDUC., THE ASIAN/PAC./AM. INSTITUTE AT N.Y.U., THE STEINHARDT INSTITUTE FOR HIGHER EDUC. POL'Y. AT N.Y.U. & COLLEGE BOARD, ASIAN AMERICANS AND PACIFIC ISLANDERS - FACTS, NOT FICTION: SETTING THE RECORD STRAIGHT 21 (2008).

⁸³ See generally Yang Sao Xiong, *Hmong Americans' Educational Attainment: Recent Changes and Remaining Challenges*, 13 HMONG STUDIES J. 52 (2012).

⁸⁴ *Id.*

⁸⁵ Alfred Chueh-Chin Yen, *The Diversity Among Us*, 19 W. NEW ENG. L. REV. 36, 37 (1997) (noting that “image of the Asian-American as the highly successful, highly educated person who makes a lot of money, is free of discrimination, and who has worked hard to get ahead.”). See also Daniels, *supra* note 65, at 317 (noting that the concept of “model minority” is now generally applied to “describe successful, upwardly mobile Asian Americans.”); Chew, *supra* note 17, at 24 (arguing that “model minority” is “[t]he belief that Asian Americans are successfully assimilated into American society.”).

⁸⁶ Don Nakanishi noted that the rise in the number of Asian Americans in U.S. colleges can be explained by demographic changes; for example, the Asian American population increased from 1.5 million in 1970 to 3.5 million in 1980 and then to 7 million in 1990. Don T. Nakanishi, *A Quota on Excellence? The Asian American Admissions Debate*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE: A SOURCE BOOK FOR TEACHERS AND STUDENTS 273, 276 (Don T. Nakanishi & Tina Yamano Nishida eds., 1995). See also Le, *supra* note 47 (arguing that “receiving an education is of paramount importance for the Asian American community.”).

⁸⁷ Frank H. Wu & William Kidder, *Perspectives: Asian Americans Aren't White Folks' 'Racial Mascots'*, DIVERSE: ISSUES IN HIGHER EDUC. (Oct. 4, 2006), <http://diverseeducation.com/article/6480/>.

⁸⁸ See Aoki, *supra* note 54, at 3 (listing important works showing the pervasiveness of negative stereotypes against Asian Americans.).

Admissions officers unintentionally believe that negative action against Asian Americans is justified because of the following corollaries of the model minority stereotype: (1) Asian Americans are only good at S.T.E.M. (Science, Technology, Engineering and Mathematics),⁸⁹ (2) Asian Americans are not well-rounded students,⁹⁰ and (3) Asian Americans are below Whites in the racial hierarchy in the United States. This Article elaborates on each in turn.

1. Asian Americans are Only Good at S.T.E.M. (Science, Technology, Engineering and Mathematics)

One corollary of the model minority stereotype is that Asian Americans are essentialized to be only “mathematically and technically oriented rather than verbally skilled.”⁹¹ One Harvard admissions officer said that Asian Americans’ admission chances are hurt as many who apply are pre-medical, science, and technical types.⁹² MIT’s Dean of Admissions described a top Asian American applicant as “yet another textureless math grind.”⁹³ According to Pulitzer Prize–winner Daniel Golden, Asians are typecast “in college admissions offices as quasi-robots programmed by their parents to ace math and science.”⁹⁴ Hence, while Asian Americans are deemed to be contenders for the Westinghouse Science Talent Search, their university admission chances are negatively impacted as they are not perceived by admissions officers to be good in other areas, including the humanities, law, and social sciences.

This essentialization of Asian Americans as only being mathematically and technically oriented needs to be challenged for many reasons. First, a low admissions rate for Asian Americans into non-mathematical and technical fields has a negative spill-over effect on academia; Asians remain underrepresented in numerous fields, such as history (2.2%), sociology (2.2%), English/literature (2.1%), philosophy (1.8%), education (1.6%), psychology (1.4%), political science (1.3%), and law (0.9%).⁹⁵ It also leads to a serious underrepresentation of Asian Americans Ph.D. holders in the humanities and social sciences.⁹⁶ This observation has important consequences for the relatively high percentage of Asian Americans who do, in fact, pursue humanities and social sciences. The notion of Asian Americans only being interested in pursuing S.T.E.M. fields is meritless.⁹⁷ In fact, Asian Americans seem *more* inclined to pursue degrees in non-S.T.E.M. fields than other groups; in 2003, for example, 26.1% of Asian Americans who received degrees majored in social sciences and the humanities, compared to the nationwide average of 19.5%.⁹⁸ Yet these degree holders, due to the unfair stigma associated with Asian Americans as only interested in S.T.E.M., may be unable to break into advanced degree programs or academia in their fields.

Universities are often explicit about the ways in which they stereotype Asian American applicants. Brown’s Admissions Director had opined that the low Asian American admissions rate is due the overwhelming

⁸⁹ See Aoki, *supra* note 54, at 46 (noting that Asian Americans are “imputed with preternatural technical expertise and a near-genetically based knowledge of the intricacies of science and mathematics.”).

⁹⁰ Tsuang, *supra* note 26, at 663.

⁹¹ Teshima, *supra* note 6, at 130.

⁹² Tsuang, *supra* note 26, at 671 n.84.

⁹³ Golden, *supra* note 4, at 201.

⁹⁴ *Id.* See also NAT’L. COMM’N. ON ASIAN AM. AND PAC. ISLANDER RESEARCH IN EDUC., *supra* note 82, at 28 (noting that Asian Americans openly and routinely discuss the “extreme pressure and demands by their parents to enter disciplines that they perceive to be secure, for example, Science, Technology, Engineering and Mathematics (STEM).”).

⁹⁵ Chin et al., *supra* note 26, at 154.

⁹⁶ *Id.* at 155-156 (noting that 70% of all Ph. D. degrees earned by Asian Americans were in engineering, life sciences, and physical sciences, whereas Asian Americans are underrepresented in humanities and social sciences.)

⁹⁷ Tsuang, *supra* note 26, at 663-665.

⁹⁸ NAT’L. COMM’N. ON ASIAN AM. AND PAC. ISLANDER RESEARCH IN EDUC., *supra* note 82, at 7 (showing that 26.1% of Asian American students, as compared to 19.5% of students for the national average, majored in social sciences and the humanities in 2003).

number of Asians applying as “pre-meds”—student who hope to pursue careers in medicine.⁹⁹ In response, the Asian American Students Association argued that the Director had never defined what constitutes a “pre-med”; instead, he based “his determination on subjective considerations and stereotypes of Asian applicants.”¹⁰⁰ Brown's Faculty Committee on Minority Affairs (COMA) rejected the idea that there are too many Asian “pre-meds” and found that the claim results from a “reliance on inference and not necessarily on the applicant's declared major.”¹⁰¹ Similarly, before adopting a completely race-blind admissions process, UC Berkeley had suggested that its low admissions rate for Asian Americans was due to too many Asian American applicants to the College of Engineering.¹⁰² Yet in its two largest engineering departments, the admissions rates of Whites exceeded that of Asian Americans in all seven years studied.¹⁰³

2. Asian Americans are Not Well-Rounded Students

Another corollary of the model minority stereotype that is used to justify negative action is the perception that Asian Americans are not well-rounded students.¹⁰⁴ Asian Americans are characterized as one-dimensional,¹⁰⁵ not well-balanced,¹⁰⁶ and as participating in fewer extracurricular activities in high school than their white counterparts.¹⁰⁷ Consequently, while Asian Americans may score well on academic ratings, they perform less well on personal ratings¹⁰⁸ and when they are assessed as part of a holistic review.¹⁰⁹

This problem is exacerbated by the fact that the admissions process is susceptible to racial stereotyping. For example, descriptions of focused interest in science or engineering might be interpreted positively when applied to Whites (e.g. “the student delves deeply into one topic and learns it thoroughly”), and negatively when applied to Asian Americans (e.g. “the student has narrow interests”).¹¹⁰

⁹⁹ Tsuang, *supra* note 26, at 663.

¹⁰⁰ *Id.* See also Suzanne Schlosberg, *Asians Charge Discrimination As Admit Rate Drops To 15 Percent*, BROWN DAILY HERALD, May 8, 1986, at 1, 10. BROWN CORP. COMM. ON MINORITY AFFAIRS, STATISTICAL SUMMARY BY THIRD WORLD CATEGORIES FOR CLASSES '79-'87 (1983), reprinted in ASIAN AM. STUDENTS ASSOC. (AASA), ASIAN AMERICAN ADMISSION AT BROWN UNIVERSITY, Tables 2a, 2b (Oct. 11, 1983).

¹⁰¹ Tsuang, *supra* note 26, at 664. See also SUBCOMMITTEE ON ASIAN AM. ADMISSIONS, REPORT TO THE CORPORATE COMMITTEE ON MINORITY AFFAIRS FROM ITS SUB-COMMITTEE ON ASIAN AMERICAN ADMISSIONS (Brown University, Feb. 10, 1984).

¹⁰² Tsuang, *supra* note 26, at 664. See generally Linda Mathews, *When Being Best Isn't Good Enough: Why Yat-pang Au Won't Be Going to Berkeley*, L.A. TIMES, July 19, 1987 (developing story of controversy in Asian American admissions in Berkeley).

¹⁰³ Tsuang, *supra* note 26, at 664; AUDITOR GENERAL OF CAL., A REVIEW OF FIRST YEAR ADMISSIONS OF ASIANS AND CAUCASIANS AT THE UNIVERSITY OF CALIFORNIA AT BERKELEY, 58-65 (Oct. 1987).

¹⁰⁴ See C.N. Le, *supra* note 40.

¹⁰⁵ See Tsuang, *supra* note 20, at 664.

¹⁰⁶ See Pat K. Chew, *supra* note 17, at 63.

¹⁰⁷ L. Biemiller, *Asian Students Fear Top Colleges Use Quota System*, THE CHRONICLE OF HIGHER EDUC., Nov. 19, 1986, at 34; Irene Chen, *Two Students Challenge Asian American Admission Discrimination*, BROWN DAILY HERALD (Feb 9, 2007), <http://www.browndailyherald.com/campus-news/two-students-challenge-asian-american-admission-discrimination-1.1674972>.

¹⁰⁸ See Tsuang, *supra* note 26, at 663.

¹⁰⁹ Timothy Egan, *The Little Asia on the Hill*, N.Y. TIMES (Jan 7 2007), <http://www.nytimes.com/2007/01/07/education/edlife/07asian.html?pagewanted=all>.

¹¹⁰ STAN. UNIV., CUAFA SUB-COMMITTEE REPORT ON ASIAN-AMERICAN ADMISSIONS 14 col. 2 (1986). See also Tsuang, *supra* note 26, at 665 n.42.

The perception that Asian Americans are not well-rounded students also stems from the fact that they are thought to be quiet,¹¹¹ non-assertive,¹¹² and lacking in English language¹¹³ and interpersonal skills.¹¹⁴ Asian Americans are thought to be less active in classrooms, and less likely to serve as charismatic and effective leaders.¹¹⁵ Hence, for university admissions, Asian Americans tend to be scored poorly and not be given a “plus” for more intangible characteristics such as leadership qualities¹¹⁶ and special talents.¹¹⁷

This essentialization of Asian Americans students as not being well-rounded can be challenged in multiple ways. Studies of Asian American applicants to Harvard, Brown, and UC Berkeley refute the stereotypical perception that Asians avoid extracurricular activities. A Department of Education study of 58,000 high school students found that Asian American students take part in all extracurricular offerings at rates comparable to those of their white counterparts. 13% of Asian Americans participated in band or orchestra compared to 14% of Whites; 30% of Asian Americans participated in varsity athletics, compared to 34% of Whites; 9% of students of Asian origin, compared with 13% of white origin, participated in drama and debate. In certain areas, in fact, Asian American participation in extracurricular activities exceeded white student participation. Asian students had higher participation rates for student government (21% versus 16% for Whites) and honorary clubs (28% versus 17% for Whites).¹¹⁸

Further, even if such stereotypes about Asian American identity were true, they would not explain the disproportionately low admissions rates of Asian American students compared with their white counterparts. Take, for instance, the case of Stanford University, which assigns each applicant a “non-academic rating” based on extracurricular achievements; a study found generally that Asian Americans were still admitted at a lower rate even when they received the same non-academic rating as Whites.¹¹⁹ Thus, it is clear that something more perniciously discriminatory at work.

3. Asian Americans are Below Whites in the United States’ Racial Hierarchy

The third corollary of the model minority stereotype that is used to justify negative action of Asian Americans is the idea that even though they are a “model” for other minorities and are deployed as the “racial middle” of the white-black racial hierarchy,¹²⁰ Asian Americans are still an inferior minority to Whites¹²¹ in the racial hierarchy.¹²²

¹¹¹ Christopher Shea, *Victim of success?: Are Asian American Students Discriminated Against in College Admissions?*, BOSTON GLOBE (Nov. 26, 2006). See also Liu, *supra* note 9, at 415.

¹¹² See Aoki, *supra* note 54, at 46. See also Chew, *supra* note 17, at 38; Teshima, *supra* note 6, at 130.

¹¹³ U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY – ASIANS: 2004 4 (2007).

¹¹⁴ See Wu, *supra* note 4, at 245.

¹¹⁵ Lydia Lum, *Asian-Americans Hope To Build Pipelines to College Presidencies*, DIVERSE: ISSUES IN HIGHER EDUC. (Oct. 5, 2009), <http://diverseeducation.com/article/13097/asian-americans-hope-to-build-pipelines-to-college-presidencies.html>.

¹¹⁶ BINGHAM MCCUTCHEN, LLP ET. AL., PRESERVING DIVERSITY IN HIGHER EDUCATION: A MANUAL ON ADMISSIONS POLICIES AND PROCEDURES AFTER THE UNIVERSITY OF MICHIGAN DECISIONS 20.

¹¹⁷ See Egan, *supra* note 104.

¹¹⁸ SAMUEL S. PENG, SCHOOL EXPERIENCES AND PERFORMANCE OF ASIAN-PACIFIC AMERICAN HIGH SCHOOL STUDENTS Table 9 (1984). Profiles of SAT candidates also indicated that ‘Asian-American students [were] more likely to participate in social, ethnic, or community organizations’ than other SAT candidates. THE COLLEGE BOARD, PROFILES, COLLEGE-BOUND SENIORS xix (1985). See also Tsuang, *supra* note 26, at 663-65.

¹¹⁹ STAN. UNIV., CUAFA SUB-COMMITTEE REPORT ON ASIAN-AMERICAN ADMISSIONS Table 5 (1986). See also Tsuang, *supra* note 26, at 664.

¹²⁰ Matsuda, *supra* note 3, at 149-50.

¹²¹ Teshima, *supra* note 6, at 128. It is paradoxical that what may be transformative (Asian Americans being commended as a model minority instead of being seen as a competitor) can also be deeply legitimizing of the status quo (Asian Americans are still seen as an inferior minority to Whites).

¹²² Saito, *supra* note 53, at 89.

Pat K. Chew is the Salmon Chaired Professor and Distinguished Faculty Scholar at the University of Pittsburgh School of Law, and was named the inaugural recipient of the Keith Aoki Asian Pacific American Jurisprudence Award in 2014. She notes that Asian Americans are the “model minority” but not “model Americans”—while Whites view Asian Americans in more favorable terms than African Americans and Latinos, they still view Asian Americans as less intelligent, more violence-prone, lazier, and more likely to prefer living off welfare than Whites.¹²³ Perhaps, worst of all, Asian Americans are viewed as a unit, rather than individuals,¹²⁴ and as perpetual foreigners.¹²⁵

C. Conscious Benevolence: Thinking That Negative Action Leads To Diversity

Some admissions officers think that negative action towards Asian Americans leads to a more diverse campus,¹²⁶ and that this diversity eventually benefits Asian Americans.¹²⁷ Such rationales for negative action suggest that Asian American students themselves feel that they have lost something by going to universities where there are many Asian Americans, as they do not get a chance to develop their intercultural skills for the real world.¹²⁸ Proponents of negative action have advanced several possible reasons for why negative action towards Asian Americans leads to a more diverse campus. Some argue that controlling the number of Asian Americans ensures that there are more spaces for less represented minorities such as Latinos and African Americans.¹²⁹ Others claim that the educational experience at these universities will be enriched with a variety of cultures and viewpoints.¹³⁰ Because of their myopic focus on their academic studies, such advocates claim, Asian Americans detract from the universities’ creativity.¹³¹ Having fewer Asian Americans contributes to the universities’ culture of fostering student leadership through student clubs, sports teams, and artistic groups.¹³²

Admissions officers striving for a diverse student population may aspire towards a system of proportional representation by race; the University of California, for example, admitted that their goal was general parity between the racial and ethnic composition of the undergraduate enrolment and the state population in general.¹³³ Other universities may seek for a university’s student population to reflect the racial and ethnic minority representation of its respective locality.¹³⁴ Yet another goal is for admissions officers to strive for a flexible critical mass or variable goal of admitted minorities, and to monitor the demographic composition of the admitted class to evaluate the status of these goals or critical masses.¹³⁵

Admissions officers striving for a diverse student population may draw inspiration from the Supreme Court cases of *Board of Regents of the University of California v. Bakke* (“*Bakke*”), *Gratz v Bollinger* (“*Gratz*”), and *Grutter v. Bollinger* (“*Grutter*”). In *Bakke*, Justice Powell indicated that it may be permissible to consider race if it was simply one factor in the admissions decision.¹³⁶ Accordingly, admissions policies that only consider race as a “plus” factor are constitutionally permissible in order to attain a diverse student body. *Grutter* and *Gratz* were a connected pair of cases in which the United States Supreme Court dealt with the affirmative action

¹²³ Aoki, *supra* note 54, at 32-33.

¹²⁴ See Miller, *supra* note 18.

¹²⁵ Matthew Yi and Ryan Kim, *Asian Americans seen negatively: results of landmark survey called startling, disheartening*, SFGATE (Apr. 27, 2001), <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2001/04/27/MN199998.DTL>.

¹²⁶ Wang, *supra* note 13, at 200.

¹²⁷ Miller, *supra* note 18.

¹²⁸ *Id.*

¹²⁹ Kang, *supra* note 7, at 15; Wang, *supra* note 13, at 200.

¹³⁰ Egan, *supra* note 104.

¹³¹ Mathews, *supra* note 69.

¹³² *Id.*

¹³³ Wu, *supra* note 4, at 245, 269.

¹³⁴ Annette B. Alaskan, *Looking At Diversity And Affirmative Action Through The Lens Of Filipino/American Students' Experience At UCLA And Berkeley*, 9 ASIAN PAC. AM. L.J. 44, 77.

¹³⁵ BINGHAM MCCUTHEN, LLP, ET. AL., *supra* note 116, at 11.

¹³⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978).

admissions policies of the University of Michigan at the law school (hereinafter “Michigan Law School”) and undergraduate (hereinafter “Michigan”) levels respectively. In *Grutter*, the court upheld Michigan Law School’s race-conscious admissions program which sought to obtain a “critical mass” of racial minorities; the flexibility of Michigan Law School’s policy distinguished it from a strict quota, as it considered a multitude of other factors in addition to race, ensuring individualized consideration of each applicant.¹³⁷ The Supreme Court’s decision to strike down Michigan’s admissions policy in *Gratz* as unconstitutional, on the other hand, emphasized that policies which automatically and inflexibly assign benefits on the basis of race, such as Michigan’s point system that allocated a fixed number of points for under-represented minority group members, are constitutionally suspect.¹³⁸ The Supreme Court’s opinions in *Grutter* and *Gratz* reinforce the importance of flexible and holistic admissions policies that employ a limited use of race.

Diversity as a basis for negative action against Asian Americans is troubling for several reasons. Ultimately, as diversity lacks an objective and precise definition, it can be formulated to exclude Asian American applicants.¹³⁹ First, diversity is a more capacious concept than that based on race and ethnicity alone;¹⁴⁰ it also encompasses a diversity of experiences, ideas, socioeconomic backgrounds, and religious beliefs.¹⁴¹ Second, even for race and ethnicity, one can advance a strong argument that Asian Americans - which comprise so many different cultures - considerably enhance the universities’ diversity. As discussed above, the ethnic, linguistic, cultural, and phenotypic variation encompassed in the term “Asian American” belies the idea that Asian Americans are monolithic and can be considered unitary for purposes of diversity. Asian American freshmen at schools like UC Berkeley comprise, among others, Chinese, Indians, Koreans, Pakistani, Filipino, Japanese, Vietnamese, and Myanmese.¹⁴²

Third, the case-law (e.g. *Bakke*) did not intend diversity to be used as a justification for discrimination against racial minorities such as Asian Americans.¹⁴³ The concept of diversity was used in *Bakke* to legally justify the universities’ use of an affirmative action program to bring in historically discriminated and underrepresented racial minorities; it was not meant as a basis for setting an unspecified upper limit of enrollment for well-qualified but overrepresented Asian Americans.¹⁴⁴ Otherwise, what was intended to be a shield for preferential admissions becomes distorted into a sword against a minority group seeking admissions.¹⁴⁵ Indeed, the Supreme Court itself has subsequently suggested that the very purpose of affirmative action is remedial; such policies are meant to correct the structural problems associated with the history of Black and Latino exclusion from higher education.¹⁴⁶ Universities’ myopic focus on proportional diversity—criticized elsewhere for its failure to actually remedy educational disparities because of the *types* of black and Latino students selected¹⁴⁷—thus also serves to disadvantage Asian American applicants.

¹³⁷ *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003).

¹³⁸ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹³⁹ Liu, *supra* note 9, at 411.

¹⁴⁰ Tsuang, *supra* note 26, at 671-72.

¹⁴¹ Liu, *supra* note 9, at 419-20.

¹⁴² Egan, *supra* note 104.

¹⁴³ Tsuang, *supra* note 26, at 672.

¹⁴⁴ Wang, *supra* note 13, at 200.

¹⁴⁵ Tsuang, *supra* note 26, at 672.

¹⁴⁶ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 789-90 (Kennedy, J., concurring).

¹⁴⁷ Valerie Strauss, *Why we still need affirmative action for African Americans in college admissions*, THE WASHINGTON POST: ANSWER SHEET (July 3, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/07/03/why-we-still-need-affirmative-action-for-african-americans-in-college-admissions/>.

D. Unintentional Benevolence: Believing That Negative Action Reduces Racial Tension And Resentment Against Asian Americans

Some admissions officers may believe that negative action benefits Asian Americans by reducing the racial tension and resentment against Asian Americans. This benevolent (albeit misguided) view may have historical roots in the early 20th century with regard to Jewish students in highly selective U.S. universities. At that time, Dartmouth's President used liberal rhetoric to justify mobilizing its alumni to interview, screen, and reject Jewish applicants, explaining it as the only way to prevent anti-Semitism from increasing in the U.S. as it had in Nazi Germany.¹⁴⁸ Meanwhile, Harvard's President said "If every college in the country would take a limited proportion of Jews, we should go a long way toward eliminating race feeling among the students, and, as these students passed out into the world, eliminating it in the community."¹⁴⁹ In the 1980s, University of California's President candidly admitted that the overrepresentation of Asian Americans had caused racial "unrest" among Whites who had been experiencing a decline in representation.¹⁵⁰

One possible reason why proponents of this theory believe negative action reduces the racial tension is that it blunts the extraordinarily competitive environment that has emerged, for example, at UC Berkeley, where white and Asian American students vie head to head not only for admission but also for access to coveted majors such as engineering and business administration, particularly in light of an increasingly competitive job market.¹⁵¹ Another explanation as to why negative action may reduce racial tension is that it reduces the number of Asian American students whose images as diligent super-students have often kindled resentment in other students.¹⁵² At the University of California, Davis, some members of the Asian American community even interpreted the murder of an Asian American graduate student as a sign that Asian Americans were studying too hard and getting too competitive.¹⁵³ Such racial tension worsens during difficult economic circumstances.¹⁵⁴

This basis for negative action, even if well-intentioned, can be criticized on several fronts. First, it is highly questionable whether reducing the number of Asian Americans in fact reduces racial tension. Even if one accepts that tenuous link, it is unfair that the cost of reducing racial tension is borne solely by Asian Americans. The problems discussed above lie solely with white students' racist conceptions of Asian Americans; catering to those views at the expense of Asian American communities is unjust. In fact, it may actually be counter-productive if it creates a pent-up resentment among Asian Americans. Finally, such actions only preserve—rather than correct and equalize—disparate power structures benefiting Whites; the same principles used to attack affirmative action for black and Latino applicants—the meritocracy principle where the efficiency of competition in academics benefits society—is somehow displaced when dealing with Asian American admissions.¹⁵⁵ The logical inconsistency of this approach evinces its pretextual nature; such policies exist primarily to preserve white America's advantages in higher education.

V. POSSIBLE WAYS FORWARD FOR ASIAN AMERICANS TO DEAL WITH NEGATIVE ACTION

Having thus presented several of the problems associated with negative action against Asian Americans, this Article now turns to re-envisioning the admissions process. What would be the ideal university admissions system? A more race-blind admissions system across the U.S. universities is likely to lead to the popular universities becoming like UC Berkeley and the California Institute of Technology in terms of the

¹⁴⁸ Wang, *supra* note 13, at 204-05; Kang, *supra* note 7, at 40.

¹⁴⁹ Wang, *supra* note 13, at 204-05.

¹⁵⁰ *Id.* at 200.

¹⁵¹ *Id.* at 193.

¹⁵² DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS 60 (1992).

¹⁵³ RONALD TATAKI, STRANGERS FROM A DIFFERENT SHORE 479 (1989).

¹⁵⁴ Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1092 - 1093 (1994). Chin, *supra* note 26, at 151.

¹⁵⁵ Gee, *supra* note 58, at 220.

percentage of students of Asian descent, that is, 45% and 43% in 2012 and 2013 respectively.¹⁵⁶ Further, such a system would do nothing to remedy the existing disadvantages facing black and Latino applicants in the college admissions process. Perhaps the best approach is to push for a more nuanced view of “diversity”; by advancing a deeper understanding of the heterogeneous makeup of America’s imperfect racial categorizations: “Asian American” populations cannot be “represented” by persons of Chinese, Japanese, Korean, and Indian origin alone. “African American” students cannot simply be recent immigrants from various parts of the continent. Rather, schools must broaden their understandings of racial identity and the complicated links between race, ethnicity, and immigration to create a truly inclusive environment.

Which strategies should be employed then to move towards this “ideal” with regard to dealing with negative action against Asian Americans? Litigation is probably not the most effective way of dealing with negative action.¹⁵⁷ This is because legal challenges often require a long runway in terms of time and other resources. Furthermore, university admissions are subjective – it is not easy to pinpoint specific examples of bias by admissions officers who have to, by necessity, reject many applicants with great resumes (near perfect SAT scores and many extra-curricular activities). These admissions officers use qualitative tools such as personal essays which are highly subjective in nature. As aforementioned, negative action is also partly motivated by unintentional racial bias which legal means are ill-equipped to handle. Finally, given courts’ general reluctance to recognize disparate impact theories of discrimination, only by showing overt and conscious discriminatory treatment can lawsuits progress. This is not to devalue the countless amicus briefs, lawsuits, and complaints filed by Asian American groups to challenge educational segregation. Such suits can be fairly effective tools to engage and educate community-based organizations and their constituencies thereby helping to ameliorate the adverse effects of negative action, and to draw attention to important issues affecting the community.¹⁵⁸

Such litigation strategies should be supplemented, however, by some extra-legal means to tackle the underlying motivations of racism and benevolence behind negative action. Grassroots organizing—from both Asian American communities outside of schools and Asian American student populations at schools—could push for more diversity recruitment coordinator positions. In doing so, these groups could propose guidelines pressing for the broader conceptions of diversity referenced briefly above. Asian Americans can also expand lobbying efforts against negative action, focusing efforts on building up a critical mass of Asian American faculty and institutional leaders, and promoting positive Asian American role models.

First, creating more recruitment coordinator positions and educating them specifically to the issues addressed in this Article can reduce the hurdles faced by Asian American applicants in the admissions process of highly selective universities.¹⁵⁹ These recruitment coordinators can help fellow admissions officers to recognize and overcome racial stereotypes¹⁶⁰ and educate them on the diversity of the Asian American community (i.e. wealth of experiences, ideas, socioeconomic backgrounds, and religious beliefs).¹⁶¹ The universities should be required to submit annual reports to the recruitment coordinators documenting the admission rates for Asian Americans compared to Whites. Such a reporting requirement would ensure that the universities are more vigilant in their efforts to eliminate discriminatory barriers for Asian American applicants and would also provide an external monitoring mechanism.¹⁶² Importantly, these recruitment coordinators could also measure the success of the “plus factor” of affirmative action in improving the admissions rates of African American students beyond just recent immigrants.

¹⁵⁶ Dhar, *supra* note 20; Hsu, *supra* note 21.

¹⁵⁷ See Tsuang, *supra* note 26, at 665 (noting how this problem can be dealt with legally under a constitutional equal protection claim).

¹⁵⁸ Robert S. Chang and Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 UCLA ASIAN. PAC. AM. L.J. 401, 402.

¹⁵⁹ Tsuang, *supra* note 26, at 677.

¹⁶⁰ *Id.* at 677.

¹⁶¹ Liu, *supra* note 11, at 419-20.

¹⁶² Tsuang, *supra* note 26, at 677.

Second, Asian Americans should expand lobbying efforts against negative action. Successful lobbying by the Asian American Law Students' Association led to UC Berkeley's Boalt Hall School of Law to create "The Asian Special Admissions Program" in 1970, which was unfortunately dismantled 5 years later.¹⁶³ Presently, Asian Americans are less politically organized and vocal than many other racial groups in the U.S.¹⁶⁴ This is unsurprising, as the Asian American community is not homogeneous; almost 30 distinct groups are lumped together under the Asian American rubric, from the fifth-generation Japanese-American to the Hmong farmer.¹⁶⁵ In addition, while the Asian American community is growing rapidly, it lacks sufficient size to generate political clout. Hence, in order for Asian Americans to have a powerful voice, Asian Americans must work in coalition with other communities that have overlapping interests.¹⁶⁶ Discrimination in education affects all communities of color, though it may take different forms against each; by building effective coalitions with other racial groups, Asian American organizers can push for a more equitable education system overall.

Third, in the middle to long term, organizers should focus on building up a critical mass of Asian American faculty and institutional leaders. Presently, such Asian American leaders are too few in number and not the decision-makers of most highly selective universities. Save for a few exceptions, Asian American leaders are woefully underrepresented in university leadership; just 33 college or universities in the United States—less than 1% of all universities—are led by Asian Americans.¹⁶⁷ Having a critical mass of Asian American faculty and institutional leaders is essential for advocating and providing leadership for and about Asian American students.

Finally, we should promote positive Asian American role models to the rest of the U.S. population to combat the unintentional bias of the admissions officers.¹⁶⁸ These role models should be high achievers with well-rounded lives and/or have excelled in fields not usually associated with Asian Americans. Present day examples include the Harvard-educated NBA basketball player Jeremy Lin, Judge Denny Chin (the only active judge of the U.S. Court of Appeals outside of California and Hawaii), Yul Kwon who was the Yale Law School and Stanford-educated lawyer and management consultant who won "Survivor" which catapulted him to People magazine's lists of "Sexiest Men Alive" and "Hottest Bachelors", and actor Daniel Dae Kim who starred in the hit TV series "Lost" and "Hawaii Five-O".¹⁶⁹ A slightly dated example but one who had ample positive media exposure is the former top-ranked tennis player Michael Chang. While the diversity of the Asian American community makes it difficult for role models to represent the entire community, such examples can break down many of the stereotypes of Asian Americans discussed in the Article. Such a long term strategy can re-negotiate Asian Americans' racialized identity¹⁷⁰ and combat the unintentional bias of admissions officers.

VI. CONCLUSION

Negative action against Asian Americans has important ramifications - it affects the next generation of Asian American leaders, with adverse ripple effects on Asian American numbers in graduate schools, academia,

¹⁶³ See Asian Am. Law Students Assoc., *Report of the Boalt Hall Asian American Special Admissions Project*, 5 AMERASIA J. 21 (1978).

¹⁶⁴ Aoki, *supra* note 54, at 46; Chew, *supra* note 17, at 4.

¹⁶⁵ Patricia Alex, *The Secret World of College Admissions*, IVY SUCCESS: THE RECORD (Jan. 30, 2005), <http://ivysuccess.com/therecord013005.html>.

¹⁶⁶ Chang, *supra* note 153, at 405-406.

¹⁶⁷ NAT'L. COMM'N. ON ASIAN AM. AND PAC. ISLANDER RESEARCH IN EDUC., *supra* note 82, at 7.

¹⁶⁸ See Chin, *supra* note 26, at 136 n.28. (Stating that "This is not to say that people can have role models of only their own race. Nonetheless, in America today, race continues to have social salience such that the successes of a minority individual will often inspire other individuals of the same race to imagine and attempt similar success.").

¹⁶⁹ Jeff Yang, *The Real Reason Why Asian Americans are Outmarrying Less*, WALL ST. J.: SPEAKEASY (Apr. 16, 2012), <http://blogs.wsj.com/speakeasy/2012/04/16/the-real-reason-why-asian-americans-are-outmarrying-less/>.

¹⁷⁰ See Aoki, *supra* note 54, at 60 (arguing that the history of Asian American racial stereotyping can and should be destabilised and reinterpreted through new artistic, cultural, economic, and legal means).

and the professional fields. To deal with negative action against Asian Americans, it is crucial to first understand the motivations behind negative action. This Article has argued that the motivations behind negative action against Asian Americans are complex – they are an intricate tapestry of racism and benevolence interwoven with both conscious and unintentional aspects. In critiquing the motivations behind negative action against Asian Americans by unpacking a four-quadrant matrix, this Article has sought a deeper understanding of how to deal with negative action against the “Model Victims.”

In order to build power in the Asian American community, such stereotyping and racialized disadvantage must be addressed in a more honest and meaningful way. Universities’ current approaches to student body demographics—whether UC Berkeley’s pure meritocracy system or the aesthetic diversity approaches of Yale or Harvard—are inadequate to ensure truly equal access to higher education. This Article argues that it is necessary to have a more nuanced conception of college diversity that remains true to the spirit of remediation for America’s legacy of racial injustice while simultaneously seeking to dismantle stereotypes and racism. Only by seriously grappling with its own history and the cultural scripts that disadvantage Asian Americans—and all groups of color—can America hope to effectuate its ideals of true meritocracy.